

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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In the Matter of )  
 )  
Amendment of Section 73.202(b), )  
Table of Allotments, )  
FM Broadcast Stations. )  
(Princeville, Hawaii) )

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

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**PETITION FOR RULE MAKING**

Comes now **John Moore d/b/a Moore Broadcasting Company ("Moore")**, by Counsel, pursuant to §1.401 of the Commission's Rules, and hereby seeks the institution of a rule making proceeding to amend Section 73.202(b) of the Commission's Rules, the FM Table of Allotments, to add Channel 260C1 to Princeville, Hawaii, and order the amendment of its application (BPH-950117MG) to specify Channel 260C1 in lieu of Channel 255C1 while maintaining cut-off protection for its application.<sup>1</sup> Also, in the event that one or more expressions of interest are received in the course of this proceeding for an additional allotment at Princeville, Hawaii, it is noted that Channel 232C1 may be allotted to Princeville, Hawaii to accommodate those expressions of interest. Thus, the following changes are proposed to the FM Table of Allotments:

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<sup>1</sup> In response to the Commission's Special Window Notice Report No. CF-29 (released December 15, 1994), and Erratum Report No. CF-29A (released December 22, 1994) Moore submitted its application for Princeville. There is one mutually-exclusive application for Princeville -- that of Vetter Communications Co., Inc. (BPH-950119MF). This rule making proposal seeks the resolution of such mutual-exclusivity by permitting the award of an FM Class C1 Construction Permit to both applicants.

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<u>Community</u>	<u>Present</u>	<u>Proposed</u>
Princeville, Hawaii	255C1	232C1, 255C1, 260C1

The allotment of Channel 260C1, as well as Channel 232C1 (if required for any additional expressions of interest) may each be made at the reference coordinates for Princeville, Hawaii of North Latitude 22 - 13 - 30, West Longitude 159 - 24 - 13. Attached to this petition is a channel study prepared by Bromo Communications, Inc. wherein it is demonstrated that each of the proposed channels are fully spaced in compliance with §73.207 of the Commission's rules.

In support of this petition, Moore submits the following:

1. This petition proposes to eliminate the mutual exclusivity between the two cut-off applications for new Class C1 FM facilities at Princeville, Hawaii. At the present time there is no basis upon which to either designate the applications for a comparative hearing, or to otherwise resolve the mutual exclusivity. *See e.g., Bechtel V. Federal Communications Commission, 74 RR 2d 348 (D.C. Cir. 1993).* By the allotment of Channel 260C1 to Princeville, Hawaii, both pending applications may be granted. If any additional expressions of interest are filed for an additional channel, Channel 232C1 may be allotted to Princeville, Hawaii.

2. This petition is consistent with the following recent Commission rulings:

Report and Order, DA 95-2493 (MM Docket 95-138; RM-8684)(released January 26, 1996) at Casper, Wyoming.

Report and Order, DA 95-2494 (MM Docket 95-98; RM-8603)(released January 26, 1996) at Cheyenne and Saratoga, Wyoming.

Report and Order, DA 95-2492 (MM Docket 95-136; RM-8682)(released January 26, 1996) at Sioux Falls, South Dakota.

3. The Commission's recent decision in *Albion, Nebraska*, 10 FCC Rcd. 3183 (1995), *app. for review denied*, FCC 95-265 (released June 27, 1995) is likewise consistent with the action requested here. In *Albion, Nebraska* a new television channel was allotted to Albion and a mutually exclusive applicant for another Albion channel was allowed to amend its application to the new channel without loss of cut-off protection.

4. The procedure proposed in this petition is also consistent with *Lander, Wyoming*, 46 Fed. Reg. 39605 (published August 4, 1981). In *Lander, Wyoming*, the Commission had before it two pending applications for VHF-TV Channel 4 at Lander, Wyoming. One applicant was seeking a non-commercial educational station on Channel 4, and the other applicant was seeking a commercial station on Channel 4. Funding for the non-commercial educational applicant was conditioned upon the use of Channel 4. The Commission held that the earliest initiation of service by the allotment of another channel would be the best solution to the proceeding. Accordingly, the Commission in *Lander, Wyoming* reserved Channel 4 for non-commercial educational use, allotted Channel 5 and allowed the commercial applicant to retain cut-off protection

while amending its application to Channel 5. The Commission held that:

The retention of cut-off protection is warranted here since any other interested commercial applicant already had the opportunity to apply for a Lander station by the recent availability of Channel 4 and none expressed an interest in doing so.

5. A like situation exists in this Channel 255C1 proceeding at Princeville, Hawaii in which two mutually exclusive applicants have each applied for the same channel. The Filing Window has opened and closed. Any other applicants that may have had an interest in applying for a Class C1 station at Princeville, Hawaii have already had an opportunity to do so. On this basis alone, it is submitted that the allotment of an additional channel to Princeville to allow both applicants to move forward while retaining cut-off protection would be fully consistent with the procedure established in *Albion, Nebraska* and *Lander, Wyoming*.

6. The public interest would be well served by the early initiation of service to Princeville from both applicants. There would be a reduction in the burdens on the Commission's processing resources by the elimination of the need for the designation for hearing of the mutually exclusive applications or the implementation of any alternative resolution method the Commission might ultimately adopt.<sup>2</sup>

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<sup>2</sup> A grant of the allotments and relief requested in this filing enables the settlement of the mutually exclusive proceeding between the two parties for Channel 255C1. Commission precedent generally favors settlements as a way of reducing the time, cost and uncertainty of protracted litigation. See generally, *RKO General, Inc. (KHJ-TV)*, 3 FCC Rcd 5057 (1988).

7. In the event that an interest is expressed by any other party in providing additional service to Princeville, Hawaii, there is an additional channel that may be allotted to Princeville, Hawaii to accommodate such an interest. The allotment of such an additional channel is in the public interest in the event an expression of interest is filed in this proceeding for such an additional channel. *See e.g., Modification of FM and Television Station Licenses, 98 FCC 2d 916, 920 (1984).* Making the additional channel available would be fully in accord with the strictures of *Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945)*. As the Commission has noted in granting modification of licenses for existing stations to non-mutually exclusive channels, "the opportunity for filing for [an equivalent] channel is the only obligation [the Commission] must fulfill to comply with *Ashbacker*." *See, Helena, Montana, 50 RR 2d 70, 71 (1981).*

8. Upon the allotment of Channel 260C1 to Princeville, Hawaii, and a reservation of Channel 260C1 for the application of Moore with cut-off protection, Moore will promptly submit an appropriate amendment specifying Channel 260C1 for its proposed facility, and when authorized, construct a station promptly on Channel 260C1 at Princeville, Hawaii.

9. Consent of Vetter Communications Co., Inc.: The proposal set forth in this petition by Moore has the acceptance and consent of Vetter Communications Co., Inc., Moore's only competitor for Channel 255C1 at Princeville, Hawaii (FCC File No. BPH-950119MF).

WHEREFORE, the above premises considered, it is respectfully requested

that a rule making proceeding be commenced looking for the allotment of Channel 260C1 to Princeville, Hawaii, and a reservation of Channel 260C1 for the amended application of Moore in order to resolve the mutual exclusivity now existing on Channel 255C1 at Princeville, Hawaii.

Respectfully submitted,

**JOHN MOORE d/b/a MOORE  
BROADCASTING COMPANY**

By:   
Cary S. Tepper

His Attorney

***Booth, Freret & Imlay, P.C.***  
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(202) 296-9100

February 6, 1996

**TECHNICAL COMMENTS**  
**FILED ON BEHALF OF**  
**MOORE BROADCASTING COMPANY**  
**PRINCEVILLE, HAWAII**  
**FEBRUARY 1996**

A channel search was authorized by Moore Broadcasting Company ("MBC") to find alternate channels for Princeville, Hawaii. In a recent filing window, two applicants filed desiring Channel 255C1 at Princeville, Hawaii. These applicants were MBC as well as Vetter Communications Company ("Vetter"). Because no mutually exclusive applications are currently being processed by the Commission, finding an alternate channel of equal class and ordering MBC to the new channel is thought to be a plan of action to get the first and second aural services licensed to Princeville on the air more rapidly than waiting for the comparative hearing process. In the event of additional expressions of interest from new parties, a third channel has been found which can be allocated if necessary.

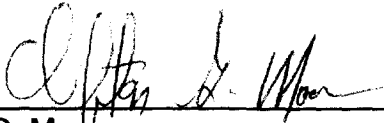
Exhibit #1 is a study from the current MBC/Vetter site on the currently allocated Channel 255C1.

MBC is requesting to be ordered to Channel 260C1 at the same site. Exhibit #2 is that study.

In the event of expressions of interest from other parties, Channel 232C1 is available to be assigned if necessary. That study is Exhibit #3.

All channels proposed herein meet all Class C1 spacing requirements of §73.207 from North Latitude 22° 13' 30" and West Longitude 159° 24' 13", the site proposed by both applicants.

Should any questions arise from this study, the undersigned will be available for discussion.

A handwritten signature in cursive script, appearing to read 'Clifton G. Moor', is written over a horizontal line.

Clifton G. Moor  
Technical Consultant to  
Moore Broadcasting Company

February 1, 1996



BROMO COMMUNICATIONS INC  
(706) 782-7222 - (202) 429-0600

Moore Broadcasting Company  
Searching on Current Channel

REFERENCE		DISPLAY DATES
22 13 30 N	CLASS C1	DATA 12-29-95
159 24 13 W	Current rules spacings	SEARCH 01-31-96
----- CHANNEL 255 - 98.9 MHz -----		

CALL	CH#	CITY	STATE	BEAR'	D-KM	R-KM	MARGIN
AP255	255C1	Princeville	HI	0.0	0.00	245.0	-245.00 *
AP255	255C1	Princeville	HI	0.0	0.00	245.0	-245.00 *
ALOPEN	255C1	Princeville	HI	174.5	25.03	245.0	-219.97 *

**255 C1 STUDY**

**EXHIBIT #1**  
**NEW FM STATION**  
**CLASS C1**  
Princeville, Hawaii  
February 1996

**BROMO**  
**COMMUNICATIONS**

BROADCAST  
TECHNICAL CONSULTANTS

BROMO COMMUNICATIONS INC  
(706) 782-7222 - (202) 429-0600

Moore Broadcasting Company  
Alternate Channel Search

REFERENCE	CLASS C1	DISPLAY DATES
22 13 30 N		DATA 12-29-95
159 24 13 W	Current rules spacings	SEARCH 01-31-96
----- CHANNEL 260 - 99.9 MHz -----		

CALL	CH#	CITY	STATE	BEAR'	D-KM	R-KM	MARGIN
KCCNFM	262C	Honolulu	HI	124.2	162.96	105.0	57.96
KORL.C	258C1	Honolulu	HI	124.2	163.14	82.0	81.14

**260 C1 STUDY**

**EXHIBIT #2**  
**NEW FM STATION**  
**CLASS C1**  
Princeville, Hawaii  
February 1996

**BROMO**  
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BROMO COMMUNICATIONS INC  
(706) 782-7222 - (202) 429-0600

Moore Broadcasting Company  
Additional Channel for future expressions of interest

REFERENCE		DISPLAY DATES
22 13 30 N	CLASS C1	DATA 12-29-95
159 24 13 W	Current rules spacings	SEARCH 01-31-96
----- CHANNEL 232 - 94.3 MHz -----		

CALL	CH#	CITY	STATE	BEAR'	D-KM	R-KM	MARGIN
KIKIFM	230C1	Honolulu	HI	122.3	186.90	82.0	104.90
KUMUFM	234C1	Honolulu	HI	122.7	192.40	82.0	110.40
KINEFM	286C	Honolulu	HI	124.2	162.96	41.0	121.96

232 C1 STUDY

EXHIBIT #3  
NEW FM STATION  
CLASS C1  
Princeville, Hawaii  
February 1996

**BROMO**  
COMMUNICATIONS

BROADCAST  
TECHNICAL CONSULTANTS

CERTIFICATE OF SERVICE

I, Cary S. Tepper, Esquire, hereby certify that on this 6th day of February, 1996, I have served a copy of the foregoing "**Petition for Rule Making**" first-class, postage-prepaid, on the following:

\*John A. Karousos  
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Federal Communications Commission  
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Cary S. Tepper, Esq.

\*/ indicates delivery by hand